

BOWMAN AND BROOKE LLP
Theodore Dorenkamp III (SBN: 277004)
Omid Shabani (SBN: 267447)
970 West 190th Street, Suite 700
Torrance, California 90502
Tel No: 310/ 768-3068
Fax No: 310/ 719-1019
Theodore.Dorenkampiii@bowmanandbrooke.com
Omid.Shabani@bowmanandbrooke.com

Attorneys for Defendants
XPEDITION LLC AND CABELA'S LLC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUSS HAMILTON, individually
and on behalf of all others similarly
situated,

Plaintiff,

vs.

XPEDITION LLC dba FORTRESS
SAFE and CABELA'S LLC

Defendants.

CASE NO.: 2:24-cv-02157-KJM-CSK

Assigned to: Hon. Kimberly J. Mueller
Courtroom: 3

**DEFENDANTS XPEDITION, LLC
AND CABELA'S LLC'S NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFF'S COMPLAINT**

Hearing Information:

Date: January 23, 2025
Time: 10:00 a.m.
Location: Courtroom 3, 15th Floor

Complaint Filed: August 12, 2024
Trial Date: None

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on January 23, 2025 at 10:00 a.m., or
as soon thereafter as the matter be heard before Hon. Kimberly J. Mueller in
Courtroom 3 at the Robert T. Matsui United States Courthouse, 501 I Street,
Sacramento, CA 95814, Defendants xPedition, LLC and Cabela's, LLC will, and

1 hereby do, move this Court for an order to dismiss Plaintiff's Complaint in its
2 entirety.
3

4 This Motion to Dismiss is based on the following grounds:

5 Plaintiff's first through fifth causes of actions fail to state claims upon which
6 relief can be granted. Fed. R. Civ. P. 12(b)(1), 12(b)(6), 8, and 9(b).
7

8 (1) The Court lacks subject matter because Plaintiff's claims are prudentially
9 moot in light of a product recall.
10

11 (2) Plaintiff has not pleaded essential elements of a UCL claim, neither
12 adequately alleging lack of an adequate legal remedy or pleading elements
13 of the claim with sufficient information to satisfy Rule 8 or Rule 9.
14

15 (3) Plaintiff's CLRA claim is barred by California Civil Code §1782(b).

16 (4) Plaintiff has not pleaded essential elements of CLRA claims, neither
17 identifying omissions or representations or pleading fraud with specificity.
18

19 (5) Plaintiff's Song-Beverly Act claim is time-barred.

20 (6) Plaintiff's common law breach of implied warranty is barred by the statute
21 of limitations and failure to provide notice, and Plaintiff has not adequately
22 pleaded the elements of breach of implied warranty.
23

24 (7) Plaintiff cannot recover under an unjust enrichment theory because there is a
25 contract and, in any event, as a matter of law there is nothing inequitable
26 about providing an improved replacement product to cure a risk of injury.
27
28

1 This Motion is based on this Notice, the attached Memorandum of Points and
2 Authorities, the concurrently filed Request for Judicial Notice, the concurrently
3 filed Proposed Order, all evidence, pleadings, and papers filed herewith, the entire
4 file in this action, any Reply that may be filed in support of the motion, and any
5 other arguments or evidence that may be presented to the Court at or before the
6 time of the hearing.
7

8
9
10 DATED: November 1, 2024

BOWMAN AND BROOKE LLP

11
12 BY: /s/ Theodore Dorenkamp III
13 Theodore Dorenkamp III
14 Omid Shabani
15 Attorneys for Defendants
16 XPEDITION LLC AND CABELA'S
17 LLC
18
19
20
21
22
23
24
25
26
27
28

Table of Contents

MEMORANDUM OF POINTS AND AUTHORITIES	7
FACTUAL BACKGROUND	7
ARGUMENT	8
I. The Court should dismiss Plaintiff’s Complaint as moot under Rule 12(b)(1).....	8
A. The CPSC recall provides Plaintiff precisely the relief he seeks.....	10
B. Plaintiff’s complaints about recall notification do not establish a live controversy.....	12
C. The Court should dismiss this Complaint as moot.	12
II. The Court should dismiss Plaintiff’s Complaint under Rule 12(b)(6). 13	
A. Plaintiff has not stated a claim under the Unfair Competition Law.13	
2. Plaintiff has not adequately alleged a violation of any of the UCL’s prongs.....	14
A. Plaintiff has not stated a claim under the California Consumer Legal Remedies Act (CLRA).....	17
1. The recall bars Plaintiff’s claim under § 1782(b).	17
2. Plaintiff has not adequately pleaded the elements of his CLRA claim.	
17	
B. Plaintiff has not stated a claim for breach of implied warranty under the Song-Beverly Act or the common law.....	18
C. Plaintiff’s unjust enrichment claim must be dismissed because there was an enforceable sales contract and, in any event, Plaintiff has not identified anything inequitable under the facts.....	19
I. Amendment Would Be Futile	20
CONCLUSION.....	20

Table of Authorities**Page(s)****Cases**

<i>Ali v. Cangemi</i> ,	
419 F.3d 722 (8th Cir. 2005)	9
<i>Cervantes v. Countrywide Home Loans, Inc.</i> ,	
656 F.3d 1034 (9th Cir. 2011)	20
<i>Chen v. Allstate Ins. Co.</i> ,	
819 F.3d 1136 (9th Cir. 2016)	9
<i>Chengv. BMW of N. Amer.</i> , No. CV 12-09262 GAF (SHx),	
2013 WL 3940815 (July 26, 2013)	9, 10, 11
<i>Cho v. Hyundai Motor Co., Ltd.</i> ,	
636 F.Supp.3d 1149 (C.D. Cal. 2022)	19
<i>Coffelt v. Kroger Co.</i> ,	
No. EDCV161471JGBKKX, 2017 WL 10543343 (C.D. Cal. Jan. 27, 2017)	10
<i>Comes v. Harbor Freight Tools USA, Inc.</i> ,	
No. CV 20-5451-DMG (KKX) 2021 WL 6618816 (C.D. Cal. Sept 29, 2021)	9, 12
<i>Decker v. Nw. Env't'l. Def. Ctr.</i> ,	
568 U.S. 597 (2013)	8
<i>Hadley v. Kellogg Sales Co.</i> ,	
243 F.Supp.3d 1074 (N.D. Cal. 2018)	14
<i>Hernandez v. Lopez</i> ,	
180 Cal.App.4th 932 (2009)	19
<i>In re Burrell</i> ,	
415 F.3d 994 (9th Cir. 2005)	8
<i>In re MacBook Keyboard Litig.</i> ,	
No. 5:18-CV-02813-EJD, 2019 WL 1765817 (N.D. Cal. Apr. 22, 2019)	9, 11
<i>In re Toyota Motor Corp. Hybrid Brake Mktg. Sales Pracs & Prod. Liab. Litig.</i> ,	
890 F.Supp.2d 1210 (C.D. Cal. 2011)	17
<i>Kearns v. Ford Motor Co.</i> ,	
567 F.3d 1120 (9th Cir. 2009)	17, 18
<i>Keegan v. Am. Honda Motor Co., Inc.</i> ,	
838 F.Supp.2d 929 (C.D. Cal. 2012)	18
<i>Korea Supply Co. v. Lockheed Martin Corp.</i> ,	
63 P.3d 937 (Cal. 2003)	13, 14
<i>Kulp v. Munchkin, Inc.</i> ,	

1	678 F.Supp.3d 1158 (C.D. Cal. 2023).....	15
2	<i>McKell v. Wash. Mut.</i> ,	
3	142 Cal. App. 4th 1457 (Ct. App. 2006)	16
4	<i>Nacarino v. Chobani</i> ,	
5	668 F.Supp.3d 881 (N.D. Cal. 2022).....	13
6	<i>Philips v. Ford Motor Co.</i> ,	
7	No. 14-CV-02989-LHK, 2016 WL 693283	9, 11
8	<i>Rattagan v. Uber Techs., Inc.</i> ,	
9	553 P.3d 1213 (Cal. 2024).....	15, 16
10	<i>Reguerio v. FCA US, LLC</i> ,	
11	671 F.Supp.3d 1085 (C.D. Cal. 2023).....	16
12	<i>Shelton v. Ocwen Loan</i> ,	
13	<i>Servs.</i> , 2019 WL 4747669 (S.D. Cal. Sept. 30, 2019).....	14
14	<i>Sonner v. Premier Nutrition Corp.</i> ,	
15	971 F.3d 834 (9th Cir. 2020)	13
16	<i>Tosh-Surryhne v. Abbot Lab'ys Inc.</i> ,	
17	No. CIV S-10-2603 KJM, 2011 WL 4500880 (E.D. Cal. Sept. 27, 2011)	9, 11
18	<i>Winzler v. Toyota Motor Sales, U.S.A., Inc.</i> ,	
19	681 F.3d 1208 (10th Cir. 2012)	10, 11, 12, 13
20	Statutes	
21	[Cal. Civ. Code] Section 1780	17
22	Cal. Civ. Code § 1770(a)(5), (7), and (9)	18
23	California Civil Code § 1782(b)	17
24	section 1782	17

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff has brought a putative class action lawsuit against Defendants because they did what they should do. xPedition discovered a potential safety hazard in one of its product lines—a gun safe—sold at Cabela’s. It recalled the safe and Cabela’s pulled it from its shelves and advertising. xPedition provided users a replacement that Plaintiff does not dispute remedies the safety hazard. Nevertheless, Plaintiff—who does not say whether he availed himself of the recall—has sued alleging that this entitles him to additional compensation.

The Court should dismiss the Complaint. First, the Court lacks subject matter jurisdiction under the doctrine of prudential mootness. Second, Rule 12(b)(6) requires dismissal where no cause of action is adequately pleaded.

FACTUAL BACKGROUND

xPedition makes safes for the secure storage of firearms and other things. This case involves safes that were equipped with a biometric “key” and a physical key. A user can secure the safe with a traditional key lock or by pairing a fingerprint to a biometric scanner so the safe will only unlock for the fingerprint-authorized user. Nothing stopped users from using both the physical key *and* the biometric key. There is no dispute that both methods reliably secure the safe.

The recall at issue arose out of an unintended consequence of the biometric key design. In the recalled design, the biometric key’s default setting was “open.” So if the biometric key was not properly programmed, the safe remained unlocked (unless secured with the physical key lock). xPedition recognized this presented a safety risk that could result in an unauthorized user gaining access.

On October 19, 2023, xPedition in coordination with the Consumer Products Safety Commission (CPSC), recalled 61,000 safes. (See Request for Judicial Notice [RJN], at ¶ 1 and Exhibit A.) The recall instructed owners to disable the biometric key and use the safe only with the physical key. Upon submitting a photograph of the disabled biometric key, xPedition sent owners a new safe. The

1 replacement safe remedies the risk by defaulting the biometric key to “closed”
 2 instead of “open.” This way, user error in programming the biometric feature will
 3 not defeat the lock.

4 The recall was publicized by the CPSC and xPedition maintains a separate
 5 website with information about the recall remedy as well as a toll-free phone
 6 number for owners to call relating to the recall. (See RJN, at ¶¶ 1-2.) Cabela’s
 7 pulled the recalled products, and includes information about the recall on a
 8 “recalls” section of its website. Cabela’s also directly notified customers of the
 9 recall. In addition to the CPSC’s, xPedition, and Cabela’s notifications, the recall
 10 was publicized across broad and diverse media including *USA Today*, the
 11 American Academy of Pediatrics, *The New York Times*, Fox Business, *AmmoLand*
 12 *Shooting Sports News*, and ABC News all reported on the recall. (See RJN at ¶ 3.)

13 Plaintiff alleges he bought one of the later-recalled safes in May 2022. He
 14 does not say how he used it—whether he used it store firearms or used the
 15 biometric feature before the recall. Although Plaintiff alleges that at some time, he
 16 was able to replicate the condition that prompted the recall, he does not state if this
 17 was inadvertent or intentional. It is unclear whether he continues to use the recalled
 18 product. Further, despite complaining that notification about the recall was
 19 inadequate in some way, Plaintiff does not say how or when he heard about it.

20 ARGUMENT

21 The Court should dismiss Plaintiff’s Complaint in its entirety for two
 22 independently sufficient reasons. First, the Court lacks subject matter jurisdiction
 23 because the recall mooted the claim. Second, Plaintiff has failed to state a claim.

24 **I. The Court should dismiss Plaintiff’s Complaint as moot under Rule** 25 **12(b)(1).**

26 Federal courts can exercise jurisdiction only over live cases that reman live
 27 throughout all stages of litigation. *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597,
 28 609 (2013); *see also In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005) (“if the

1 controversy is moot, [courts] lack subject matter jurisdiction, and the concomitant
2 ‘power to declare the law[.]’” (internal citations omitted)).

3 There are two varieties of mootness: Article III mootness and prudential
4 mootness. Article III mootness applies when there is no longer a justiciable
5 controversy. “A lawsuit—or an individual claim—becomes moot when a plaintiff
6 actually receives all of the relief he or she could receive on the claim through
7 further litigation.” *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016).
8 Prudential mootness is the “cousin of the mootness doctrine . . . relating to the
9 court’s discretion in matters of remedy and judicial administration.” *Ali v.*
10 *Cangemi*, 419 F.3d 722, 724 (8th Cir. 2005). “Under the doctrine of prudential
11 mootness, there are circumstances under which a controversy, not constitutionally
12 moot, is so attenuated that considerations of prudence and comity for coordinate
13 branches of government counsel to stay its hand, and to withhold relief it has the
14 power to grant.” *Cheng v. BMW of N. Amer.*, No. CV 12-09262 GAF (SHx), 2013
15 WL 3940815 at *2 (July 26, 2013).

16 Recalls often implicate prudential mootness. To avoid a finding that a recall
17 mooted a claim, the plaintiff must allege facts showing that the recall is
18 insufficient. *In re MacBook Keyboard Litig.*, No. 5:18-CV-02813-EJD, 2019 WL
19 1765817 at *8 (N.D. Cal. Apr. 22, 2019). A recall remedy does not have to satisfy
20 the plaintiff, only to make the plaintiff whole. *Tosh-Surryhne v. Abbot Lab ’ys Inc.*,
21 No. CIV S-10-2603 KJM, 2011 WL 4500880 at *5 (E.D. Cal. Sept. 27, 2011)
22 (finding the defendant’s offer of replacement product mooted unjust enrichment
23 claim). Failure to take advantage of offered relief that would completely remedy
24 the plaintiff’s alleged injury defeats standing absent a “cognizable danger that the
25 recall process will fail.” *Comes v. Harbor Freight Tools USA, Inc.* No. CV 20-
26 5451-DMG (KKX) 2021 WL 6618816 *5 (C.D. Cal. Sept 29, 2021). To show a
27 cognizable danger of failure, the plaintiff must allege something more than
28 conjecture. *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2016 WL 693283

at *10–11 (N.D. Cal. Feb. 22, 2016). When a recall “provides plaintiff precisely the relief he seeks, his claims are prudentially moot and properly dismissed.” *Cheng*, No. CV 12-09262 GAF (SHx), 2013 WL 3940815 at *2, *citing Winzler v. Toyota Motor Sales, U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012).

Rule 12(b)(1) is the proper vehicle to address mootness. A court considering a motion under Rule 12(b)(1) may look beyond the language of the complaint and is not obligated to accept as true the allegations therein. *Coffelt v. Kroger Co.*, No. EDCV161471JGBKKX, 2017 WL 10543343 at *3 (C.D. Cal. Jan. 27, 2017).

A. The CPSC recall provides Plaintiff precisely the relief he seeks.

The crux of Plaintiff’s Complaint is that he and other class members have been injured by having purchased a safe that he contends is defective. (Pl. Compl. at ¶¶ 42, 43, 64, 77, 90, 101, 114.) But the recall provided the full relief that Plaintiff seeks. It provides, at no additional cost to the consumer, a new replacement product. Plaintiff does not dispute that the replacement resolves the potential hazard posed by the recalled product. This remedy is available to all purchasers, regardless of when they bought their safes, how they used them, and whether they had ever incorrectly programmed the biometric feature.

By replacing the biometric safe with a new product that remedies the problem, xPedition has ensured that Plaintiff and all other purchasers received the benefit of the bargain. Neither Plaintiff nor any other purchaser has lost money or property—in fact, some may come out ahead, choosing to use the recalled safe under lock and key mode *and* receiving the new biometric safe. Any alleged “overpayment or diminution of value” is resolved by the recall remedy, which restores to purchasers a safe, fully functioning gun safe with a biometric lock feature. (Pl. Compl. at ¶¶ 89 (alleging overpayment and diminution of value).)

Nevertheless, Plaintiff asserts that the recall does not moot this lawsuit because (1) the recall does not provide refunds, and (2) it is “not viable” for those

1 who do not want a biometric safe or an xPedition product. (Pl. Compl. at ¶¶ 42,
2 43.) These allegations are insufficient to avoid dismissal.

3 Unavailability of a refund does not render a recall insufficient so long as the
4 recall remedy makes the plaintiff whole. *See Tosh-Surryhne*, No. CIV S-10-2603
5 KJM, 2011 WL 4500880 at *5 (rejecting claim demanding refund rather than
6 replacement offered through recall program); *Winzler*, 681 F.3d at 1214 (“to allow
7 a case to proceed simply because there happen to be differences between the
8 remedial process a coordinate branch has selected and those we might choose. . .
9 would require us to ignore reality that there’s often no one single right way to go
10 about providing equitable relief to an injured party.”) When a manufacturer issues
11 a recall offering to “completely repair” the asserted defect, a Plaintiff is hard
12 pressed to demonstrate some cognizable injury that could establish a cause of
13 action. *Cheng*, No. CV 12-09262 GAF (SHx), 2013 WL 3940815 at *2. Plaintiff
14 does not identify any loss he has experienced that would not be resolved by a
15 replacement product.

16 Nor does Plaintiff’s statement that he—and possibly others—may not want
17 another biometric safe or xPedition product establish a viable claim. To avoid
18 dismissal, a plaintiff must adequately plead that a recall is not sufficient in a non-
19 speculative way. *In re MacBook Keyboard Litig.*, No. 5:18-CV-02813-EJD, 2019
20 WL 1765817 at *8; *Philips*, No. 14-CV-02989-LHK, 2016 WL 693283 at *10–11.
21 This means alleging specific facts showing that the recall remedy fails in a material
22 respect. *Id.* Plaintiff has not alleged any. It is undisputed that the replacement safes
23 remedy the problem. Plaintiff’s speculative fear that a biometric safe may not
24 work¹ or that xPedition products are unsatisfactory is not enough to show that the
25 recall is insufficient. Plaintiff’s failure to allege that he availed himself of the recall
26

27 ¹ The replacement safe, like its predecessor, can function in lock-and-key mode as
28 well as through a biometric feature. If some consumers no longer trust biometric
features, the replacement safe remains an appropriate alternative.

1 forecloses any argument that the recall was insufficient. *See Comes*, No. CV 20-
 2 5451-DMG (KKX) 2021 WL 6618816 *5.

3 **B. Plaintiff’s complaints about recall notification do not establish a live**
 4 **controversy.**

5 Plaintiff also alleges that the recall notice was insufficient. (Pl. Compl. at ¶¶
 6 3, 5.) But he does not say how. Nor does he say how and when he learned about it.
 7 There is no allegation that he was harmed by any supposedly inadequate notice.
 8 Nor does he support his subjective belief in its inadequacy with facts or
 9 information suggesting that buyers were not aware of it.

10 **C. The Court should dismiss this Complaint as moot.**

11 This is a case that cries out for the application of the prudential mootness
 12 doctrine. Plaintiff bought a gun safe that xPedition later recalled, offering to
 13 provide him without charge a new replacement. The fact that he prefers a cash
 14 refund instead, and harbors some speculative fear that other buyers might not know
 15 about the recall, does not warrant this Court’s jurisdiction.

16 As now-Justice Gorsuch explained, a lawsuit pleading entitlement to
 17 equitable relief beyond a recall is an “appeal to the remedial discretion of the
 18 courts,” and this discretion includes the “concomitant power to deny relief
 19 altogether unless the moving party can satisfy the court that relief is needed.”
 20 *Winzler*, 681 F.3d at 1210 (internal alterations and citations omitted). “Even
 21 though a flicker of life may be left in it, even though it may still qualify as an
 22 Article III ‘case or controversy,’ a case can reach the point where prolonging
 23 litigation any longer would be itself inequitable.” *Id.* This is such a case.

24 Plaintiff can avail himself of the recall. He will receive a new safe with a
 25 fully functioning biometric feature—the exact type of product he chose to buy in
 26 2022. And if he does not want to use the biometric feature, he does not have to—
 27 the safe will still work in lock and key mode. It is inequitable to subject xPedition
 28 and Cabela’s to a putative class action to provide Plaintiff a forum to quibble over

the form of relief when xPedition and Cabela’s did exactly what the law and public policy required them to do. They identified a potential safety hazard and conducted a comprehensive recall through the CPSC to completely replace the product. There is “not enough value left for the courts to add in this case to warrant carrying on with the business of deciding its merits.” *Winzler*, 681 F.3d at 1211.

II. The Court should dismiss Plaintiff’s Complaint under Rule 12(b)(6).

Plaintiff has also failed to state a claim upon which relief could be granted as to any cause of action, warranting dismissal under Rule 12(b)(6).

A. Plaintiff has not stated a claim under the Unfair Competition Law.

Plaintiff’s first cause of action is under the Unfair Competition Law (UCL). He has not adequately pleaded his entitlement to equitable remedies, and has not sufficiently alleged a violation under any of its three prongs.

1. Plaintiff has not established that he is entitled to equitable relief.

The UCL provides only equitable relief. Before a court can permit restitution, the Plaintiff must show that there is an inadequate remedy at law. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 841 (9th Cir. 2020). The Court must consider whether a remedy exists, not whether it is pursued or can be successful. *Nacarino v. Chobani*, 668 F.Supp.3d 881, 894 (N.D. Cal. 2022). To plead a UCL claim, the Plaintiff must show why the remedy at law is inadequate or incomplete. *Sonner*, 971 F.3d at 844.

Plaintiff asserts that he does not have an adequate remedy at law. (Pl. Compl. at ¶¶ 35–40.) But he does not explain why or how. He offers vague and boilerplate allegations about the supposed superiority of equity. The closest he comes is his assertion that equitable relief would entitle him to “recover all profits from the wrongdoing, even where the original funds taken have grown far greater than the legal rate of interest would recognize.” (Pl. Compl. at ¶ 38.) But “nonrestitutionary disgorgement is not an available remedy in an individual action under the UCL.” *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 947

(Cal. 2003). “The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.” *Id.* Disgorgement of profits would not return him to the status quo because it would not return to him property in which he had a vested interest. *Id.*

2. Plaintiff has not adequately alleged a violation of any of the UCL’s prongs

To assert a claim under the UCL, Plaintiff must plead 1) the violation of a law (the unlawfulness prong); 2) a fraudulent practice; or 3) unfairness.

a. Plaintiff has not stated a claim under the unlawful prong.

To plead a claim under the unlawfulness prong, the plaintiff must allege a predicate violation and an accompanying economic injury allegedly caused by it. *Shelton v. Ocwen Loan Servs.*, 2019 WL 4747669 at *10 (S.D. Cal. Sept. 30, 2019). Plaintiff does not specify what law xPedition or Cabela’s supposedly violated, asserting that they violated unspecified “consumer protection laws and the common law as set forth herein.” (Pl. Compl. at ¶ 60.) Plaintiff has thus conceded that if his allegations in Causes 2 through 5 fail, so too does his UCL claim under the unlawfulness prong. *See Hadley v. Kellogg Sales Co.*, 243 F.Supp.3d 1074, 1094 (N.D. Cal. 2018) (recognizing that if plaintiff cannot state a claim under the predicate law, the UCL claim fails). As explained in Sections 2.B–E, he has not stated a claim as to any of his other causes of action.

b. Plaintiff has not stated a claim under the fraudulent practices prong.

Plaintiff also asserts that he has a claim under the fraudulent practices prong. These allegations sound must meet the heightened pleading standard of Rule 9(b). In this section of the Complaint, Plaintiff alleges that xPedition and Cabela’s engaged in a “fraudulent conduct” and, without saying what they are supposed to have done, he asserts that they acted intentionally. (Pl. Compl. at ¶¶ 58–60.) The “Factual Allegations” section of his brief provides limited clarification, suggesting

1 that he is trying to make a fraudulent omission claim based on a supposed
2 obligation to disclose that the biometric lock was designed to default to “open.”

3 A fraudulent omission claim is actionable if it is contrary to a representation
4 actually made or constitutes an omission of a fact that the defendant was required to
5 disclose. *Kulp v. Munchkin, Inc.*, 678 F.Supp.3d 1158, 1169 (C.D. Cal. 2023). To
6 plead fraudulent concealment, the plaintiff must show that there was concealment
7 or suppression of a material fact by a defendant with a duty to disclose, that the
8 defendant intended to defraud the plaintiff, and that the plaintiff was unaware of the
9 fact and would have acted differently and was damaged by the concealment.
10 *Rattagan v. Uber Techs., Inc.*, 553 P.3d 1213, 1238 (Cal. 2024). A defendant has a
11 duty to disclose a fact when 1) the duty is imposed by statute; 2) the defendant is in
12 a fiduciary relationship with the plaintiff; 3) the defendant had exclusive knowledge
13 of the material facts that are not reasonably discoverable by plaintiff; 4) the
14 defendant makes a representation but fails to disclose facts that materially qualify
15 the facts or render a disclosure misleading; or 5) when the defendant actively
16 conceals facts. *Id.* The final three circumstances “presuppose an existing
17 relationship between the parties” and cannot be derived from dealings between the
18 defendant and the public at large. *Id.*

19 First, Plaintiff has not adequately pleaded that xPedition failed to disclose a
20 fact it was obligated to disclose. Plaintiff identifies no representation that xPedition
21 supposedly made. And he has not shown any duty to disclose additional facts.
22 Plaintiff has not identified any duty imposed by statute. He does not allege that
23 xPedition was in a fiduciary relationship with him. This leaves only the final three
24 circumstances identified in *Rattagan*. These cannot apply to xPedition because
25 Plaintiff does not allege that he had any pre-existing relationship with xPedition—
26 the basis for his claims are xPedition’s dealings with the public at large. Therefore,
27 his UCL claim based on the fraudulent practices prong must fail.
28

Second, his allegations as to Cabela's fail because they are not pleaded with particularity. As with xPedition, Plaintiff has not identified any false representation, any duty imposed by statute or the existence of a fiduciary relationship. That leaves only the last three circumstances. If a plaintiff alleges that the defendant's duty to speak "arise[s] by virtue of the parties' relationship and defendant's exclusive knowledge or access to certain facts . . . the complaint must also include specific allegations establishing all the required elements." *Id.* To state a claim, Plaintiff was required to allege "(1) the content of the omitted facts, (2) the defendant's awareness of the materiality of those facts, (3) the inaccessibility of the facts to plaintiff, (4) the general point at which the omitted facts should or could have been revealed, and (5) justifiable and actual reliance, either through action or forbearance, based on the defendant's omissions." *Id.* Plaintiff's claims against Cabela's turns on the parties' buyer-seller relationship. But he only formulaically recites the elements of the claim unadorned by specific facts. (Pl. Compl. at ¶¶ 22–33.) This is insufficient under Rule 9(b).

c. Plaintiff has not adequately pleaded the unfairness prong of the UCL.

Plaintiff alleges that his UCL claim is also based on the unfairness prong. Conduct is actionable under the UCL if it "violated public policy, [is] immoral, unethical, oppressive, or unscrupulous and causes injury to consumers outweighing benefits." *McKell v. Wash. Mut.*, 142 Cal. App. 4th 1457 (Ct. App. 2006). "To sufficiently plead a claim under the UCL's 'unfair' prong, [the] plaintiff must allege facts supporting all three elements." *Reguerio v. FCA US, LLC*, 671 F.Supp.3d 1085, 1098 (C.D. Cal. 2023). Plaintiff has not. He offers the conclusory assertion that xPedition and Cabela's conduct was unfair. (Pl. Compl. at ¶ 61.) But he does not offer facts to show that recalling and replacing a product violated public policy or was in any way immoral, unethical, oppressive, or unscrupulous. Therefore, the Court should dismiss Plaintiff's UCL claim as well.

A. Plaintiff has not stated a claim under the California Consumer Legal Remedies Act (CLRA).

Plaintiff's second cause of action is for breach of the CLRA. This cause of action must be dismissed because it is barred by California Civil Code § 1782(b) and, in any event, because he has not pleaded the essential elements of his claim.

1. The recall bars Plaintiff's claim under § 1782(b).

Section 1782(b) states, "No action for damages may be maintained under [Cal. Civ. Code] Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice [of a CLRA claim]." Plaintiff provided notice of his CLRA claim in June 2024. (Pl. Compl. at ¶ 34.) xPedition recalled the safes in October 2023, eight months earlier. The recall provides for a complete replacement. Plaintiff was eligible to receive a replacement when he sent his letter—and he remains eligible to receive it now. Therefore, Defendants agreed to give an appropriate "replacement" "within 30 days after receipt of the notice."

The CPSC recall satisfies section 1782 and bars Plaintiff's claim. Plaintiff's preference for a refund does not defeat this. Section 1782 requires only that the defendant agree to give an "appropriate" remedy—not the remedy of a plaintiff's choice. The CPSC determined that this remedy was appropriate, and Plaintiff has pleaded no facts suggesting otherwise. *C.f., In re Toyota Motor Corp. Hybrid Brake Mktg. Sales Pracs & Prod. Liab. Litig.*, 890 F.Supp.2d 1210, 1218 (C.D. Cal. 2011) (finding plaintiffs' allegations that recall did not fix alleged defect prevented reliance on section 1782).

2. Plaintiff has not adequately pleaded the elements of his CLRA claim.

"Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA[.]" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). When a CLRA claims turn on alleged deceptive or misleading representations, the

1 plaintiff is obligated to identify them with specificity, articulating “the who, what,
2 when, where, and how of the misconduct alleged.” *Id.*

3 Plaintiff identifies three subsections of the CLRA that he contends xPedition
4 and Cabela’s violated: 1) representing that goods have “sponsorship, approval,
5 characteristics, ingredients, uses, benefits or quantities that they do not have”; 2)
6 representing that goods are “of a particular standard, quality, or grade, or that
7 goods are of a particular style or model if they are of another,” and 3) “advertising
8 goods with the intent not to sell them as advertised.” Cal. Civ. Code § 1770(a)(5),
9 (7), and (9). But Plaintiff’s Complaint identifies no representations.

10 Other than listing these statutes and declaring that “Defendants’ unfair and
11 deceptive acts or practices occurred repeatedly in Defendants’ trade or business,”
12 Plaintiff’s Complaint is devoid of facts to support them. (Pl. Compl. at ¶¶ 66–72.)
13 The closest he comes is a general reference to “product packaging and product
14 webpages,” without identifying any particular content. (Pl. Compl. at ¶ 27.) This
15 cannot satisfy Rule 9(b). Therefore, Plaintiff’s CLRA claims must be dismissed.

16 **B. Plaintiff has not stated a claim for breach of implied warranty under**
17 **the Song-Beverly Act or the common law.**

18 To state a claim for breach of an implied warranty of merchantability, a
19 plaintiff must plead that “the product did not possess even the most basic degree of
20 fitness for ordinary use.” *Keegan v. Am. Honda Motor Co., Inc.*, 838 F.Supp.2d
21 929, 945 (C.D. Cal. 2012). A product need only be “reasonably suited for ordinary
22 use” and does not need to be “perfect in every detail so long as it provides for a
23 minimum level of quality.” *Id.*

24 Plaintiff has not—and cannot—plead a breach of implied warranty under
25 these circumstances. His lawsuit is about the CPSC recall and the safety hazard
26 that prompted it. As Plaintiff acknowledges, the safety hazard is that “Consumers
27 may believe they have properly programmed the biometric feature when in fact the
28 safe remains in the default to open mode.” (Pl. Compl. at ¶ 17.) Plaintiff offers

1 conclusory allegations that the safe was not fit for its ordinary purpose, but alleges
2 no facts to support this claim. (Pl. Compl. at ¶¶ 83, 93.)

3 This case does not involve a defect that impairs how a product is supposed
4 to function. Instead, the recall protects against the consequence of user error. The
5 hazardous condition arises only if a user incorrectly programs the safe. Plaintiff
6 does not allege that the safe—as originally designed—did not function as a
7 biometric gun safe. It was recalled not because it was not fit, but because the
8 consequences of user error were significant, but correctable. Thus, Counts 3 and 4
9 of the Complaint should be dismissed.

10 **C. Plaintiff's unjust enrichment claim must be dismissed because there was**
11 **an enforceable sales contract and, in any event, Plaintiff has not**
12 **identified anything inequitable under the facts.**

13 Plaintiff's final cause of action is for unjust enrichment. Unjust enrichment
14 applies when a plaintiff has no enforceable contract, but has conferred a benefit on
15 the defendant, which the defendant has accepted under circumstances that would
16 make it inequitable to retain. *Hernandez v. Lopez*, 180 Cal.App.4th 932, 938
17 (2009). It is an equitable claim and can apply only when the plaintiff has an
18 inadequate remedy at law. *Cho v. Hyundai Motor Co., Ltd.*, 636 F.Supp.3d 1149,
19 1172 (C.D. Cal. 2022). This cause of action must fail because Plaintiff has
20 adequate remedies at law and Plaintiff has not pleaded any facts showing inequity.

21 First, Plaintiff has remedies at law. He seeks money damages in the form of
22 a refund under various causes of action. Further, because this transaction involved
23 the sale of goods, it is governed by the Uniform Commercial Code.

24 Second, Plaintiff identifies nothing inequitable. xPedition manufactured and
25 Cabela's sold Plaintiff a biometric gun safe. When xPedition identified a potential
26 safety hazard stemming from its misuse, it recalled it and offered a replacement
27 product. This is what the Consumer Product Safety Act envisions. And the remedy
28

1 ensured that Plaintiff was made whole. Plaintiff has not identified any reason that
2 this sequence of events could or should be deemed inequitable.

3 **I. Amendment Would Be Futile**

4 Because Plaintiff cannot allege facts beyond those asserted because no such
5 facts exist, amendment would be futile, and amendment should not be allowed. *See*
6 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011)
7 (dismissal without leave to amend proper where “leave to amend would be futile
8 because the plaintiffs cannot state a plausible basis for relief”).

9 **CONCLUSION**

10 For the foregoing reasons, Defendants’ motion should be granted without
11 leave to amend. 

12 DATED: November 1, 2024

BOWMAN AND BROOKE LLP

14 BY: /s/ Theodore Dorenkamp III
15 Theodore Dorenkamp III
16 Omid Shabani
17 Attorneys for Defendants
XPEDITION LLC AND CABELA’S
18 LLC
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2024, I electronically transmitted the foregoing **DEFENDANTS XPEDITION, LLC AND CABELA'S LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT** to the Clerk's Office using the CM/ECF System for filing thereby transmitting a Notice of *Electronic* Filing to all CM/ECF registrants.

/s/ Theodore Dorenkamp III

SERVICE/MAILING LIST
Russ Hamilton vs. XPedition LLC, et al.
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No: **2:24-cv-02157-KJM-CSK**

SMITH KRIVOSHEY, PC Attorneys for Plaintiff
Yeremey O. Krivoshy, Esq. Tel: 415/ 839.7000
166 Geary Street, Suite 1500-1507 Fax:
San Francisco, CA 94108 Email: jeremey@skclassactions.com

SMITH KRIVOSHEY, PC Attorneys for Plaintiff
Joel D. Smith, Esq. Tel: 617/ 377.7404
867 Boylston St., 5th Floor, Ste 1520 Fax:
Boston, MA 02116 Email: joel@skclassactions.com